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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	WT Docket No. 97-82
Comment on Broadband C and F)	DA 97-679
Block Rules and Installment Payment)	
Issues)	

REPLY COMMENTS OF R & S PCS, INC.

R & S PCS, Inc. ("R&S"), hereby submits these reply comments in response to filings made with the Federal Communications Commission (the "Commission") in the above-referenced proceeding on June 23, 1997. These comments address a limited number of issues which if not resolved immediately will result in mass bankruptcies, suppress the value of C-Block licenses and reduce competitiveness in the wireless marketplace.

I. Introduction.

Notwithstanding the variety of proposals made in response to the Commission's June 2 Public Notice,^{1/} many of the comments filed in this proceeding share a common theme: they confirm the need for waiver or modification of the C-Block rules to ensure the viability of C-Block PCS businesses and the efficient use of C-Block spectrum.^{2/} Indeed, even commenters

^{1/} Public Notice, "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," WT Docket No. 97082, DA 97-679 (June 2, 1997).

^{2/} See e.g. Comments of Alpine PCS, Inc., Comments of Americall International, LLC, Comments of Bear Stearns Investment Bank; Comments of BIA Capital Corporation, comments of Brookings Municipal Utilities Rural Telephone Company, Comments of Chase Communications, Comments of Clearcomm, Comments of Eldorado Communications, LLC, Comments of Fortunet Communications, Comments of General Wireless, Inc.; Comments of Holland Wireless LLC *et al.*; Comments of Horizon Personal Communications; Comments of Indus, Inc.; Comments of Magnacom Wireless, LLC; Comments of MCI Communications Corporation; Comments of MFRI Incorporated; Comments of the National Association of Black-Owned Broadcasters, Inc.; Comments of the National Wireless Resellers Association; Comments

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who oppose significant waivers or modifications of the C-Block rules urge the Commission to provide C-Block licensees with greater flexibility in satisfying their financial obligations in recognition of the dramatic financial and competitive changes that have affected the wireless marketplace since the conclusion of the C-Block auction.^{3/}

At this crucial time in the development of wireless competition, the Commission must take steps to put wireless licenses in the hands of entities that are financially capable of building out a competitive PCS network and satisfying C-Block financial obligations. While R&S supports many of the proposals made by the commenters to facilitate third-party investment in designated entity PCS entities, it also recognizes that in some geographic areas, and for some licensees, successful stand-alone operation of a small business PCS company will never be financially feasible. For these entities, it is important that the Commission provide alternatives for license transfer without default or transfer penalties.

II. The Commission Has the Authority to Waive or Modify its C-Block Rules to Preserve Prior Investment in C-Block Licenses.

A number of parties challenge the Commission's authority to waive or modify the Commission's rules to provide relief for C-Block licensees based on changed circumstances. Some commenters argue, for instance, that the Commission cannot waive or modify its PCS rules to favor small businesses or otherwise "discriminate" in favor of companies that face

of NextWave Telecom, Inc.; Comments of Onque Communications, Inc.; Comments of PCS Plus LLC *et al.*; Comments of Pocket Communications; Comments of Richard L. Vega Group; Comments of Urban Communicators PCS Limited Partnership.

^{3/} See e.g. Comments of Omnipoint Corporation at 2-3; Comments of Southwestern Bell Mobile Systems at 7; Comments of the Small Business Coalition at 1; Comments of Merectel Communications Limited Partnership at 2.

substantial barriers to accessing capital.^{4/} These arguments, however, conflict with the 1993 Budget Act. The Commission is operating under an express Congressional mandate to disseminate licenses among a wide variety of applicants and to give small businesses, rural telephone companies, and businesses owned by members of minority groups and women an opportunity to participate in the provision of spectrum-based services.^{5/} It also has been authorized to apply rules to services based on particular contexts and circumstances.^{6/} Arguments that the grant of waivers or modifications of the Commission's C-Block rules are improper if not extended to other services, therefore, should be disregarded.

It also is well-settled that the Commission is *obligated* to revisit its rules when factual and legal circumstances so dictate.^{7/} As confirmed by the D.C. Circuit, the Commission is required to reexamine particular regulations when "abnormal circumstances" make it imperative

^{4/} See *e.g.* Comments of Northcoast Communications, LLC at 7-8.

^{5/} Omnibus Budget Reconciliation Act of 1993, Section 309(j)(4)(A); 47 U.S.C. § 309(j)(4)(A) ("In prescribing regulations . . . the Commission shall (A) consider alternative payment schedules and methods of calculation, . . . , or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;").

^{6/} See *Second Report and Order*, Competitive Bidding, PP Docket No. 93-253 ¶ 10 ("In the future, specific rules . . . will be adopted in a Report and Order for each service subject to competitive bidding. These subsequent Reports and Orders will set forth specific competitive bidding rules for each service that meets the criteria in Section 309(j)(2).").

^{7/} See *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Circuit 1992) (if underlying circumstances change, the Commission is compelled to revisit the applicable regulations to ensure that the public interest continues to be served); See *Notice of Proposed Rulemaking*, Docket No. 19918, RM-2235, 44 FCC 2d 794, 796 (rel. Jan 10, 1974) (recognizing Commission's need to modify rules that, based on erroneous assumptions, are not in the public interest and do not reflect the Commission's intentions or expectations).

that an adjustment of the Commission's rules take place.^{8/} As shown by investment bankers and lenders, the financial environment in which designated entities must operate has changed dramatically since the C-Block auction.^{9/} Today, the rules that were intended to encourage the participation of designated entities no longer are accomplishing their purpose and, in fact, are inhibiting the fulfillment of the Commission's goals for the C-Block.

Contrary to certain comments received in this proceeding, the Commission is authorized to proceed by waiver, and is not required to change its rules in the context of a notice-and-comment rulemaking proceeding.^{10/} As previously illustrated in the C-Block context, the Commission has issued blanket waivers when the requirements for their grant have been met.^{11/} In addition, the Commission already has expressed a willingness to waive or modify its PCS rules in circumstances of financial distress.^{12/} Further, the Commission is expressly authorized to

^{8/} See *Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979) (determining that the Commission not only has permissive authority to re-examine rules when abnormal circumstances warrant, but is obliged to do so); see also *General Telephone Co. of Southwest v. U.S.*, 449 F.2d 846, 863 (5th Cir. 1971) ("Where the on-rushing course of events have outpaced the regulatory process, the Commission should be enabled to remedy the problems . . .").

^{9/} See e.g. Comments of Bear Sterns Investment Bank at 3 (recognizing that C-Block market enterprise valuations have fallen far below those that existed at the time of the C-Block auction); see also Comments of Clearcomm, L.P. at 2 (recognizing difficulty of securing necessary public equity or debt capital when the valuation of domestic wireless companies have dropped dramatically).

^{10/} See Comments of BellSouth Corporation at 15-16.

^{11/} See *Order*, Waiver of Section 24.813 of the Commission's Rules -- General Requirements for the Broadband Personal Communications Service, PP Docket No. 93-253 (rel. May 19, 1995).

^{12/} See Public Notice, "Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block auction" at 6 (rel. June 8, 1995); *Letter* to Leonard J. Kennedy and Richard S. Denning from William E. Kennard, General Counsel of FCC and Michele C. Farquhar, Chief, Wireless Telecommunications Bureau (rel. December 17, 1996).

forebear from applying existing rules under Section 10 of the Communications Act when application of the Commission's rules will impair competitive forces in the marketplace.^{13/} In this case, C-Block licensees cannot operate effectively because of C-Block rules that restrict the licensees' ability to attract capital, and limit license transfers to qualified buyers. The changed circumstances set forth in R&S' June 23 Waiver Petition justify a waiver of C-Block rules.^{14/}

Denials of earlier waiver requests do not bar the Commission from providing the relief requested by the C Block licensees.^{15/} In this case, *most* C-Block licensees now face imminent financial distress. Given the intense financial pressure being exerted on C-Block licensees, it is impractical, untimely and contrary to the public interest to fashion a remedy in the context of a

^{13/} See Section 10, Communications Act of 1936, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 10 (1996) ("[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, . . . in any or some of its or their geographic markets, if the Commission determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.").

^{14/} See Comments of R&S PCS, Inc., WT Docket No. 97-82 (filed June 23, 1997).

^{15/} See *e.g.* Comments of Cook Inlet Region, Inc., Wireless PV/SS PCS, L.P., Western Wireless, Airgate Wireless, Ariel Communications, Telecorp. Inc. at Airadigm Communications at 10-13 (arguing that the denial of waivers to IVDS auction winners would be inconsistent with grant of relief in the C-Block).

notice-and-comment rulemaking.^{16/} Grant of waivers, however, can provide necessary, timely relief to ensure the future success of the C-Block licenses.

Finally, modifications of the Commission's PCS rules would not constitute retroactive rulemaking as argued by some commenters.^{17/} Relief provided by waiver or modification of the Commission's rules would have only *prospective* application because it would modify, for the future, rights or obligations previously granted or imposed by the Commission.^{18/} Indeed, adoption of BellSouth's expansive interpretation would convert all waivers and subsequent Commission rule changes into "retroactive" rules.^{19/}

III. The Commission Should Permit the Return or Transfer of C-Block Licenses Without Imposition of Substantial Penalties.

Because of considerable financial and competitive changes in the wireless industry in the past three years, the Commission must take steps to preserve the competitive viability of the C-

^{16/} See Comments of MCI at 2 ("further delay, in order to complete a formal rulemaking proceeding, could postpone restructuring so long as to virtually extinguish financing options for some Entrepreneurs").

^{17/} See Comments of BellSouth Corporation at 25-26; Comments of Community Service Communications, Inc. at 9-10.

^{18/} See *e.g. Mobile Communications Corporation of America v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996) (upholding FCC's modification of payment terms after narrowband PCS pioneers preference license was awarded).

^{19/} While R&S believes that arguments made against the waiver of existing C-Block rules are unfounded, it also appears that many parties seeking to block Commission waivers of C-Block rules lack standing to challenge such Commission actions. Standing requires a direct and cognizable injury that simply cannot be demonstrated by parties seeking only to inhibit the development of competition in the wireless market. See *In re Application of National Broadcasting Co., Inc.*, 4 RR 2d 550, 552 (1965) (concluding that competitive injury is of such a tangential and conjectural effect that it cannot meet the test of "direct" and "substantial" injury). Attempts to prevent the success and entry of C-Block licensees into the marketplace should be summarily rejected. Indeed, the Commission must proceed to further Congress' goal for the C-Block by waiving or modifying applicable C-Block rules that inhibit the use of C-Block licenses and the growth of C-Block businesses.

Block. As reflected in the comments, C-Block licensees continue to face barriers to accessing capital that prevent them from entering into the wireless marketplace.^{20/} In fact, rules initially intended to benefit small businesses are now preventing them from effectively managing their license interest, transferring their licenses to financially qualified entities or attracting capital from private investors, lending institutions or traditional financial markets.^{21/}

A. Filing Window For Return of C-Block Licensees to the Commission

To address these issues the Commission should establish a filing window during which C-Block licensees would be permitted to return their licenses to the Commission for reauction and receive the return of their prior payments.^{22/} Establishing the window will allow C-Block licensees to exit a wireless marketplace that favors the largest entities and excludes or disfavors small businesses.

Contrary to certain comments filed in this docket, there is no public benefit to forcing C-Block licensees into bankruptcy under the guise of preserving existing bid prices. A number of parties argue that relieving C-Block licensees of the restrictions of the designated entity Block

^{20/} See e.g. Comments of Bear Sterns Investment Bank; Comments of BIA Capital Corporation Investment Banker; Alpine PCS, Inc. at 2 ("Unfortunately, in the race for investment dollars, Block C and F licensees are falling behind"); Comments of the Small Business Coalition at 6.

^{21/} See e.g. Comments of BIA Capital Corp. at 1 ("We believe the primary obstacle to more active development of the spectrum has resulted primarily from a confluence of financial issues originating from the government's financing of the cost of C-Block licenses."); Comments of MFRI Incorporated at 2-3 ("A vexing problem that MFRI has experienced is the response of lenders to the terms and conditions made part of the security agreement and note that secures the C and F Block licenses.").

^{22/} See also Comments of Horizon Personal Communications at 13. ("Under current rules, a licensee that is not able to finance the build-out and operation of some, but not all, of its licenses has no ability to eliminate those areas which are not valuable.").

will reduce payments to the U.S. Treasury.^{23/} Without waiver or modification of the Commission's rules, however, many C-Block licensees will likely find themselves bankrupt and the U.S. Treasury will remain unable to collect on its outstanding debt. Restructuring of the C-Block debt, however, will enhance the ability of the Treasury to collect payments from many C-Block licensees.^{24/} Similarly, establishing an opportunity for return and immediate reauction of C-Block licenses will avoid the substantial costs of foreclosure and the pursuit of futile collection remedies.

By establishing a filing window, C-Block licensees who face financial difficulties that cannot be remedied will be permitted to turn in their licenses, giving the Commission an opportunity to reauction licenses that may already be clustered, or otherwise suitable for aggregation. Thus, in instances of financial distress, the Commission will be able to maximize returns in the competitive bidding process while also offering potential bidders spectrum from which to expand a competitive wireless business.^{25/}

B. Transfer of Licenses to Non-Designated Entities

The Commission should permit transfers to non-designated entities in cases of financial distress without imposition of existing unjust enrichment penalties. Permitting such transfers

^{23/} See e.g. Comments of BellSouth Corporation at 13; Comments of Community Service Communications, Inc. at 8.

^{24/} See Comments of Holland Wireless, LLC, Wireless 2000, Northern Michigan PCS Consortium LLC, PCSouth, Inc. and Communications Venture PCS Limited Partnership at 5 ("No one other than incumbent winners who desire less competition, will benefit from widespread default by PCS auction winners.").

^{25/} See Comments of Cook Inlet at 26 ("[T]he Commission might receive the same or better present value in the aggregate if it . . . reauctions . . . C-Block licensees.")

will preserve the value already invested in the C-Block enterprise and will place the licenses in the hands of companies that are financially able to construct a viable PCS network.^{26/}

Limiting potential buyers to other small businesses or designated entities through the imposition of the unjust enrichment provisions likely will result in greater C-Block defaults because there are few, if any, designated entity licensees in a position to acquire additional C-Block licenses. Thus, opening the pool of potential buyers will ensure timely satisfaction of outstanding debt obligations and permit those designated entities with deep pockets to purchase the licenses. Moreover, by permitting license transfers, the Commission avoids any risk of a *potential* reduction in the amount of monies owed to the U.S. Treasury. It also ensures payment of existing debt obligations imposed on the incumbent C-Block licensees.

Designated entities will continue to have the opportunity to participate in the provision of PCS service, and will have the ability to purchase licenses from the incumbent C-Block licensees. However, to the extent a C-Block licensee is in financial distress in particular markets, any interested buyer, designated entity or non-designated entity, would be eligible to acquire such licenses and provide service to the public.^{27/}

^{26/} See Comments of Chase Telecommunications at 6-8; Comments of Dewey Ballantine at 3-4 (such buy-outs would "allow an undercapitalized licensee to become adequately capitalized, thereby increasing and enhancing its ability to provide service to the public."); Comments of Fortunet Communications at 5-6.

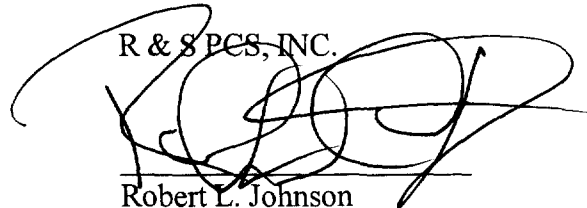
^{27/} An additional option also could be the use of agency agreements. The Commission should permit licensees to enter into agreements with other carriers that could facilitate compliance with the Commission's PCS build-out requirements. See e.g. Comments of Dewey Ballantine at 5 ("[W]e suggest that agency agreements provide an alternative means that may allow for the continued operation of C Block licensees in financial difficulty. In other contexts, Commission licensees have resorted to agency agreements as a substitute for outright ownership in order to respond to market imperatives without running afoul of the Commission's limitations.").

IV. CONCLUSION

The Commission is faced with a critical decision concerning how to promote the use of C-Block spectrum in the hands of licensees in financial distress. Without providing current licensees an ability to: (1) sell their businesses or return their licenses to the Commission without penalty; and (2) attract the necessary amount of capital to run their businesses, many C-Block licensees will be faced with mass bankruptcies. Additional flexibility is needed under the Commission's C-Block rules to avoid such dire consequences.

Respectfully submitted,

R & S PCS, INC.

A large, stylized handwritten signature in black ink, appearing to read 'R & S PCS, INC.' followed by a flourish.

Robert L. Johnson
President
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CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, do hereby certify that on this 8th day of July, 1997, I caused copies of the foregoing "Reply Comments of R & S PCS, Inc." to be served via hand delivery to the following:

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